Supreme Court, U.S.
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Case No. 92-1152

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

WESTERN GAS RESOURCES, INC.,
SUCCESSOR IN INTEREST TO
WESTERN GAS PROCESSORS, LTD.,

Petitioner,

v.

M. K. HEIDI HEITKAMP,
TAX COMMISSIONER OF THE
STATE OF NORTH DAKOTA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE NORTH DAKOTA SUPREME COURT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

This Reply to Respondent's Brief in Opposition to Petition for Writ of Ceriorari is filed to address the argument raised in Respondent's Brief concerning the North Dakota Supreme Court's reliance upon "extrinsic aids" in order to sustain the Tax Commissioner's interpretation of the oil extraction tax ("OET"). Initially, it should be noted that the Tax Commissioner does not dispute that the critical phrase contained in the OET, "on the lease," is a phrase understood in the industry to mean "at the wellsite and the custody transfer meter." Every witness and industry expert who testified agreed with this understanding. Furthermore, there is nothing in the statute which would alert a reasonable taxpayer that any other meaning of "on the lease" was intended. Despite the fact that the *plain meaning* of the phrase "on the lease" is not in dispute, the Tax Commissioner and the North Dakota Supreme Court resorted to extrinsic aids to support their interpretation of the OET. The extrinsic aids referred to on page 5 of the Brief in Opposition are legislative history and legislative intent.

The North Dakota Supreme Court examined the legislative history and concluded that, when taken as a whole, it indicated a legislative intent which would support the Tax Commissioner's interpretation. (Appendix, Part A, pages A-6 to A-7.) The North Dakota Supreme Court, however, failed in any way to address the plain meaning of the phrase "on the lease," and given the plain meaning, whether notice was provided to Western in regard to its obligation to collect and pay the OET to the State of North Dakota.

Assuming *arguendo*, however, that resorting to legislative history and legislative intent is necessary in this case, the best evidence of the legislative intent is the statement made in Conference Committee by Senator Moore. In this meeting, the members of the Conference Committee discussed the differences in the definition of oil under the North Dakota Gross Production Tax and the OET. In discussing these differences, Senator

Moore noted that under the OET, liquid hydrocarbons are taxed if there are "any liquid hydrocarbons that are recovered from gas *and this is on the site*." (Finance and Tax Conference Committee Tapes, Tape 47, Side 2.) The North Dakota Supreme Court referred to Senator Moore's statement in its opinion and stated that this is "one legislator's statement" (Appendix, Part A, pages A-6 to A-7), but inexplicably chose not to adopt this statement as any indicia of legislative intent. What the North Dakota Supreme Court failed to note, however, is that this was the *only* statement by any legislator that can be found in the legislative history.

On page 6 of her Brief in Opposition, the Tax Commissioner states, "Reasonable persons in the same situation as Western would know that condensate is subject to the oil extraction tax." In light of this statement, the question must be asked, how could Western have known? Given the undisputed facts that the plain meaning of the phrase "on the lease" means the wellsite and the custody transfer meter, and that even if Western had gone beyond the language of the statute and examined the legislative history, the only statement it would have found by a legislator concerning the meaning of the OET is that of Senator Moore, the answer to the question is that Western could not possibly have known. Western was entitled to rely upon the plain meaning of the phrase "on the lease" in governing itself and its obligations under the OET. If, in fact, there had been adequate notice to Western of its obligation to collect the OET, it clearly would have done so. It must be remembered that the tax is not a tax on Western, but a producers' tax which Western was obligated to collect and pay to the State of North Dakota. Western received no benefit by failing to collect the tax and pay it to the State of North Dakota during the years at issue. Western is an intermediary whose statutory responsibility is to collect the tax from funds due producers and pay it to the State of North Dakota.

CONCLUSION

Western was entitled to rely upon the plain meaning of the statute in carrying out its obligations as a collection agent for the Tax Commissioner. Given the plain meaning of the statute, the Tax Commissioner's and the North Dakota Supreme Court's interpretation of the OET results in a denial of due process to Western. Western therefore requests that this Court grant its Petition for Writ of Certiorari and review this case in its entirety.

Respectfully submitted,

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